

**THE LAWS
GOVERNING MARRIED WOMEN
IN THE
PROVINCE OF QUEBEC**



By C. G. OGDEN, K.C.

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Foreword

I have in this short treatise endeavoured to give a synopsis of the general rules of law governing married women in the Province of Quebec, but as a legal sketch of this nature can only serve as an elementary guide to the student, I venture to suggest—for I am aware that a legal essay in the hands of a layman may prove almost as dangerous as a medical pamphlet in the hands of a neurotic—that all women contemplating matrimony, and also those already married, who may be confronted with problems relating to their state of servitude, should not fail—even if they think they understand the law—to consult their family lawyer. His particular knowledge of their circumstances in life and his legal experience will enable him to start the neophyte on the right road at the outset, and later on to keep her out of hidden pitfalls.

C. G. OGDEN.

INSURANCE EXCHANGE BUILDING,
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The highly interesting and informative subject treated in the following pages has been prepared for us by C. G. OGDEN, K.C., of Montreal, to whom we make grateful acknowledgment. Our thanks are also extended to HONOURABLE JUSTICE EDOUARD SURVEYER, who read the manuscript, for his valuable comment on the work contained in his letter which is published herewith.

"I have read with interest the essay made by Mr. Charles G. Ogden, K.C., on the Status of married women in the Province of Quebec. It contains, to my mind, a very clear and accurate statement of the law, and you are to be commended for distributing the work, thereby dissipating popular errors on the subject."

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THE LAWS GOVERNING MARRIED WOMEN IN THE PROVINCE OF QUEBEC

By C. G. OGDEN, K.C.

The laws relating to married women may be classified under two headings.

FIRST:—Those defining her political rights and disabilities, and

SECOND:—The laws which define and restrict her matrimonial and civil rights.

No Right to Vote in Provincial Elections

With regard to Provincial Elections in the Province of Quebec, no woman, married or single, rich or poor, has any right to vote.

Municipal Elections—Wife separate as to property entitled to vote under certain conditions.

It is provided by the City Charter that a married woman, who is separate as to property,—either by law, marriage contract or by judgment of the Court—when owner of real estate of the assessed value of \$300.00 or upwards, or when she carries on trade or keeps a place of business which renders her subject to the payment of taxes, and when such place of business is entered on the

tax roll as being of the assessed annual value of \$30.00 or upwards, is entitled to vote, but no woman common as to property has a right to vote in municipal elections.

Matrimonial and Civil Rights.

There are two systems of law governing married women—and also married men in this Province:

FIRST, Community of Property, which is established by law and which creates a sort of partnership between the husband and the wife, with the husband as predominant partner.

This system or regime applies to all married couples domiciled in the Province of Quebec at the time of their marriage, even though the marriage may take place in another Country,—unless they have executed a Marriage Contract before marriage in the manner described in the second system.

The domicile of the married pair is by law the domicile of the husband at the time of the marriage.

In many cases, as will be explained further on under a special sub-heading under “Separation as to Property”, the determination of the domicile of the husband turns on difficult questions of law and fact.

SECOND, Separation as to Property, which the law allows to be created by Marriage Contract. This contract must be made *before* marriage, and passed before a Notary in order to have any legal effect, and, unlike most promises made before marriage, must be kept, and can be legally enforced.

Judicial Separation

The law, however, wisely provides that the wife common as to property, may obtain a judicial separation as to property, when her interests are imperilled and the disordered state of the husband's affairs give reason to fear that his property will not be sufficient to satisfy what the wife has a right to receive or get back. This provision of law might perhaps be more frequently taken advantage of. After judgment is rendered, the immoveable property, and other assets of the Community, are divided under the directions of the Judge, who usually first appoints an expert, referred to as a "Praticien", to take an inventory and make a report to the Court.

Separation as to bed and board

When a wife is separate from her husband as to bed and board by a judgment of the Court, such a judgment confers upon the wife full civil capacity to act without the necessity of marital or judicial authorization. The causes of separation from bed and board are specified by the Civil Code as follows:

A husband may demand the separation on the ground of his wife's adultery.

A wife may demand the separation on the ground of her husband's adultery, if he keep his mistress in their common habitation.

Husband and wife may respectively demand this separation on the ground of outrage, ill-usage or grievous insult committed by one toward the other.

The grievous nature and sufficiency of such outrage, ill-usage and insult, are left to the discretion of the court, which, in appreciating them, must take into consideration the rank, condition and other circumstances of the parties.

The refusal of a husband to receive his wife and to furnish her with the necessities of life, according to his rank, means and condition, is another cause for which she may demand the separation.

Separation from bed and board carries with it separation of property.

General Statement of Law Governing Community Property and Almost Absolute Power of Husband.

Origin of the Law—derived from Roman Law of Patria Potestas. According to the old Roman Law, which was modified during the later days of the Empire, a wife was on a par with her children, and the father had even the power of life and death over his children.

The sole surviving relic to-day of the Patria Potestas is the power of the husband over the community property and the common purse, and these means are really the only means, although at times quite effective means, which the husband has of enforcing the article of the Code, solemnly prescribing that the wife must obey her husband.

Community of Property

Under the first system mentioned; that of Community, the property of the community is owned in common by the husband and wife, but is controlled by the husband alone.

Assets of the Community

The assets of the community are defined by an Article (Article 1272) of the Civil Code, as follows:

The assets of the community consist:

1. Of all the moveable property which the consorts possess on the day when the marriage is solemnized, and also of all the moveable property which they acquire during marriage, or which falls to them, during that period, by succession or by gift, if the donor or testator have not otherwise provided;
2. Of all the fruits, revenues, interests and arrears of whatsoever nature they may be, which fall due or are received during the marriage, and arise from property which belonged to the consorts at the time of their marriage, or from property which has accrued to them during marriage, by any title whatever;
3. Of all the immoveables they acquire during the marriage;

Another article of the Code (Article 1276) dealing with the property which does not fall into community, provides that legacies and gifts made by ascendant (Mother, Father, etc.) relatives to either the husband or wife, shall not fall into community, but shall be the private property of the husband or wife, as the case may be; but that all other gifts or legacies made by relatives other than ascendants, shall form part of the community property, unless otherwise provided by the deed or will.

For example—

1. Assuming that the wife's father or grandfather gives her a house or leaves her one by his will, this will

be and remain her private property, even though this is not specifically mentioned in the deed;

2. If, however, a similar gift or legacy were to be made by an uncle, who wished to benefit a married niece but, at the same time, desired to keep the property out of the clutches of the creditors of an incompetent or unfortunate husband, it would be necessary for him to say so in the deed, although it would not, of course, be necessary for him to specify his reasons.

Moveables Acquired by Succession—either by Will or Otherwise—during Marriage.

With regard, however, to moveable property, which term includes the most desirable kind of moveable property in the shape of ready money, a different rule applies, and all gifts and legacies of money, furniture, bonds or stocks, made to the wife by ascendants, even by her father and mother, will fall into the community and under her husband's control, unless the donor or testator especially provides by the deed or will that the money shall not fall into the community.

The husband has the right to administer the wife's private property, so that he alone can lease a house belonging to her and rents fall into the community to be theoretically shared alike by consorts or spent on the children.

Liabilities of the Community

The liabilities of the community may be roughly said to consist of all debts contracted by the husband, and

all debts contracted by the wife with her husband's consent or authority, either express or implied in certain cases, and all the charges of marriage—which are numerous—including those required for the maintenance of the children who, after a certain age, are usually more exacting than the wife, and more extravagant than their parents.

Among the liabilities of the community, are to be counted the debts of the husband and wife contracted before marriage and this gave rise to the old French maxim: "That he who marries a wife marries her debts."

Administration of the Community

With regard to what may be termed the business management of the community property, the husband alone has full power of disposition and administration, including power to sell or mortgage the immoveable property. He may even give away moveable property, provided he does so "without fraud."

The general rule of law is that the husband alone has power to take actions in law and to defend actions taken against his wife, who cannot sue or be sued alone—which is not altogether a disadvantage for her—but this rule is by certain amendments made to the law within recent years subject to the following exceptions in favour of the wife:

1. A wife common as to property may sue in her own name for wages earned by her own work, for such earnings are now regarded as belonging to her personally.

2. It is also now provided by special articles of the Civil Code that where the husband refuses or is unable to act, through absence or other cause, the wife, with the authorization of the judge, may exercise alone or in her name an action to recover damages for personal injury. The husband must be impleaded, but shall incur no liability, either personally or as head of the community, unless he becomes a party to the contestation. It must be pointed out, however, that damages for "personal injury" have been held by our courts to mean damages recoverable in actions based on libel, slander, or assault, and not damages arising out of mere negligence, such as damages caused by a fall on a slippery sidewalk, or injuries sustained in an automobile accident. The wife common as to property cannot therefore sue alone in cases of this latter category. In all such cases—with the exception of actions for the recovery of the personal earnings of the wife, which she may take alone—if the husband elects to take the action he is entitled to keep the amount of the judgment as head of the community.

The husband is, in fact, as the French law so well puts it, lord and master over the property, although the article of the Code bequeathed to us from a bygone age solemnly providing that the wife owes her husband obedience may be entirely disregarded, and it is already, like most unenforceable laws, almost entirely forgotten.

In fact, the Code specifically provides that, even when the consorts are separate as to property, a wife who may be quite old enough to vote, and who marries a man not of age, requires the authorization of her minor husband before she can sell her own property.

It is therefore evident, that, even under the regime of separation as to property, the husband still has some means of indirectly bringing about some slight measure of respect for the oft forgotten article of the Code regarding obedience, which is similar in terms to those of the marriage service.

Wife Acting as Public Trader

The Civil Code of this Province provides that a wife, who is a public trader, may obligate herself for all that relates to her commerce; and in such case she also binds her husband, if there be community between them.

She cannot become a public trader without the express or implied authorization of her husband.

Bank Deposits

There is, however, one liberty allowed to a married woman common as to property in money matters.

She may keep any amount on deposit in a bank without her husband's authorization, and draw cheques against it as she pleases; but it must be pointed out that, while, under the provisions of a recent statute amending the Bank Act, the banks are entitled to receive and pay out such deposits, that the husband may nevertheless, if he chooses, claim the deposit if he can establish that the monies belong to the community. In other words, the statute was introduced as a matter of convenience to protect the banks, but was not intended to deprive the husband and has not the effect of depriving the husband of any of his rights as head of the community.

Before the latest amendments to the Bank Act, the largest amount a wife common as to property was entitled to keep on deposit and deal with, without her husband's authorization, was fixed at \$2,000.00.

Right to Make a Will

Another right, which a wife common as to property enjoys, is the right to make a will, for while the husband has control of the wife's share of the community during her lifetime, the framers of the Code generously gave her the right to direct in what manner her share of the community property should be disposed of after her death.

Rights of Wife at Death of Husband.

With regard to the position of the wife at the death of her husband, neither of them can make a will disposing of more than his or her share of the community, but at the dissolution of the community by death

1. The wife gets one-half of the community property;
2. In addition to this, she gets her dowry, which is established by law (Article 1434) and consists in the usufruct for the wife, and the ownership for the children, of one-half of the immoveables which belong to the husband at the time of the marriage, and of one-half of those which accrue to him during marriage from his father or mother or other ascendants.

To illustrate this, if a man owned a house which had been willed to him by his father, and another house which he had bought before marriage, the wife, after

his death, will be entitled to one-half the rentals of both his houses; but if he had purchased another house during marriage, this would fall into the community and she would have a one-half interest in this house.

She would be entitled also to one-half of all the money and furniture left, as well as the total of any insurance policy made payable to her.

Life Insurance

The husband, under a special statute, has the right to insure his life in favour of his wife, or to appropriate a policy which he has already taken out payable to his heirs, in favour of his wife.

This appropriation or transfer in favour of the wife may be made by a transfer endorsed upon, or attached to the policy, or may even be made by will, provided that the policy be sufficiently designated, and if this be done, all insurance monies payable to the wife become, at the death of the husband, her own money and are not regarded as part of the husband's estate, which the wife inherits, and such insurance monies cannot be seized for debts of the husband. If, however, she obtains the money from the Insurance Company and deposits it in her own bank account it can be seized for *her own debts*.

Succession Rights—Wife's Rights as heir at law when husband dies intestate.

Under an amendment to the Code, introduced several years ago as a result of the united efforts of certain public spirited women and with the co-operation of the late

Lieutenant-Governor Perodeau, then a Minister in the Provincial Cabinet, the wife may, if she prefers to do so, claim her right to her share in the succession of her husband, if he dies without making a will, instead of claiming her community rights. The old law regarded the wife as a very distant relative and she was only entitled to inherit provided that the husband left no relative within the twelfth degree surviving him.

Under the present law, the wife is entitled, if her husband dies without a will, to claim "one-third" of his total estate if he leaves children, and if he leaves no children but leaves a father and mother, nephews and nieces, she is entitled to one-half of his estate, and if he leaves neither father nor mother nor nephews and nieces, she can claim everything.

To illustrate this, in the case where a husband dies leaving a wife and children, if the total assets of the community were only \$5,000.00 and life insurance policies appropriated in favour of the wife were to amount to \$5,000.00, and the husband's private property consisting of real estate was worth \$30,000.00, it would be to the advantage of the wife to claim her share under the law regarding successions, even though she would have to renounce to her community rights and to the proceeds of insurance policies and return the same into the mass of the estate. In this particular case she would, under the system of community, receive one-half of the assets of community, \$5,000.00, viz. \$2,500.00, plus the insurance of \$5,000.00, making a total of \$7,500.00, whereas by renouncing to her community rights and returning the insurance into the mass of the estate she

would be entitled to receive one-third of \$40,000, which would amount to over \$13,000.00 instead of the \$7,500.00 which she would receive by retaining her community rights. A wife separate as to property may also, provided that she renounces to her rights under her marriage contract and allows the insurance monies to be paid into the mass of the estate, claim in like manner her share in her late husband's estate.

In the majority of cases, under the regime of community, the wife stands in practice to gain rather than to lose, since the husband in this country usually owns more property than the wife at the time of marriage.

The wife separate as to property was however often unfairly treated under the old law. In one case a husband, who died without a will, left about \$250,000.00 all of which, except about \$30,000 which the wife was entitled to under her marriage contract, went to his children by a former marriage.

Testate Successions — Wife's Rights when Husband leaves a Will.

If the wife is common as to property and the husband dies leaving by his will everything he possesses to relatives and excluding the wife, she will nevertheless secure her one-half share in the community property, for this share is her own, and her husband,—although he could during his lifetime, as head of the community, have sold it,—cannot dispose of it by will.

If on the other hand the wife is separate as to property and her husband cuts her off by his will, she will

only receive on his death, such money and property as she may be entitled to under her marriage contract, whereas in case the husband leaves no will she may execute her rights in the manner above described.

Disadvantages of Community and Advantages of Marriage Contract.

Under modern business conditions, where fortunes are sometimes easily made, and more easily lost, the regime of community of property is certainly not an ideal system for a business man, for if the husband becomes bankrupt, his wife loses everything. Under the regime of separation as to property, the wife owns and administers her own property, which cannot be seized for her husband's debts.

Wife May Take Part in Family Council

Married women, whether common or separate as to property, are, by a comparatively recent amendment to law, capable of taking part in a Family Council, but no woman is obliged to accept a tutorship and may exact release therefrom, even after accepting.

A Family Council is a body consisting in number of seven persons at least, of those most nearly related or allied to the minor and taken as equally as possible from both the paternal and maternal line.

The holding of a family council is required in such cases as the appointment of a tutor to a minor, the interdiction of a person for insanity and drunkenness, and the appointment of a curator to the interdicted person.

Separation as to Property

Separation as to property is created in the following cases:

1. Separation by marriage contract made before marriage in the manner, and subject to the formalities already described at p. 2.
2. Separation by judgment of the court after marriage, for the reasons above described at p. 3.
3. Separation created by law alone, when husband domiciled at time of marriage in another Country, or in another Province of Canada in which Separation as to Property is the law of the land.

The matrimonial status in so far as separation or community is concerned is, as has already been pointed out, governed by the law of the Country or Province in which the husband is domiciled at the time of the marriage, irrespective of the Country or Province in which the marriage is actually celebrated.

Separation as to property by operation of law of Country in which husband domiciled at time of marriage.

If the husband at the time of the marriage is actually domiciled in a Country, or even in another Province in the Dominion, in which Separation as to Property is the governing law, Separation as to property is then recognized to exist according to the laws of Quebec, even though the marriage may be celebrated in this province, and the husband subsequently may change his domicile and establish a home in the Province of Quebec.

On the other hand if the husband be legally domiciled in the Province of Quebec and the marriage takes place in another Province or Country where separation as to property is the law, the wife is common as to property—according to the law of the Province of Quebec in which he is domiciled—and a subsequent change of domicile will not change the law.

Questions involving domicile, and change of domicile, in cases in which the husband moves from place to place and it is difficult to determine his “principal establishment”, often involve great legal difficulties and uncertain litigation. The subject is, however, too long and complicated to be dealt with here at any length, and a few practical illustrations will suffice to demonstrate the questions that may arise requiring legal advice.

Cases illustrating difficulties arising out of changes of domicile

The following cases which occurred—one many years ago and two others comparatively recently—afford apt illustrations of the questions of law and fact that may arise in certain cases involving change of domicile.

In the first case a young business man came from England to the Province of Quebec, acquired a fair financial position, went back to England on a long visit—but without abandoning either his business, which was in a flourishing condition, or his residence in the Province of Quebec. While in England he married an English lady, went on a long wedding trip, and then established

a home with her in this Province. As the years went by he accumulated what was then regarded—and might perhaps be looked upon today—as a large fortune. He died many years after his marriage, and when the time came to divide the estate, more than one eminent lawyer representing different interests came to the conclusion that the wife was separate as to property and not entitled—for there was no will—to a share in the estate, according to the law as it then existed, which excluded a wife from inheriting if the deceased left children, or relatives within the twelfth degree.

The widow at the outset was willing to accept their opinion and her misfortune—for she was English born and thought that the laws of England must apply to her—but, luckily for her, she consulted her family lawyer, then a comparatively youthful member of the Bar, who was endowed with a keen legal mind, and had the additional advantage of a thorough knowledge of all the facts—some of which had been either inadequately presented to, or overlooked by, the other counsel—and in the end his opinion to the effect that the widow was common as to property with her late husband prevailed, and the widow secured her share of all the real property, securities and monies standing in the name of her late husband.

In another case a married woman, living in this Province, whose husband was both ill and absent in Europe where he had taken up a new domicile, and was also unwilling to sign any authorization in her favour, came into a legacy by general title. If she was to be regarded as common as to property—and she was advised

that she was by many well meaning business men—it was necessary for her to obtain her husband's authorization before accepting this legacy even though his rights to the legacy itself were excluded by the terms of the Will. In addition to this she could not enter into any business transactions with the money—even if she could get it with his consent—without his authority.

She consulted her family lawyer who knew that while the marriage had taken place in Quebec the husband, who was a civil engineer travelling from place to place, had been legally domiciled in another Province of Canada at the time of the marriage where the law provided for separation as to property, although he had abandoned his domicile and returned to Quebec about a year after the marriage. Proceedings were taken and a judgment obtained declaring the wife separate as to property and entitled to receive the legacy without obtaining the authorization of her husband. In this case, however, it was necessary for the wife's attorney to make proof of all facts relating to the domicile of the husband, and in addition to this to obtain an affidavit from a lawyer, practising in the Province in which the husband was domiciled, to the effect that separation as to property was the law of that Province governing married persons.

In a third and comparatively recent case a couple, who were married, and domiciled at the time of their marriage in England, came to live in Quebec where they resided for some years. All the furniture in the house was purchased by the wife with her own money. A judgment for a debt other than house rent was obtained by a

creditor against the husband, and the furniture was seized under this judgment. The wife was at first convinced that she would lose her furniture, but she nevertheless consulted a lawyer two days before the sale regarding the possibility of obtaining delay. On his advice an Opposition to the sale was made by the wife alleging that she was separate as to property according to the laws of England, and that she had purchased the furniture with her own money. Evidence was made proving both these facts and her Opposition was maintained.

*Rights and legal position of wife under regime
of Separation as to Property*

With regard to the position of the wife separate as to property, the principal right she enjoys is the administration of her own property, but she cannot sell or mortgage it without her husband's authorization, or the authorization of a judge, if her husband refuses, and the husband, even though a minor, may authorize his wife who is of age.

The wife can, therefore, under this system, rent her own house, collect her rents and also dividends on her stocks and interests on money in the bank and save, spend and squander the money as she sees fit.

With regard to the authorization of the husband, which should be in writing, this authorization must, according to the law of Quebec, be given either before, or at the time the deed is executed, otherwise it is of no avail; but under the French law, which is in this respect

more reasonable than our own, a husband may subsequently ratify and approve a deed or contract already made by his wife, if he sees fit to do so, and if he does so, the deed is valid.

Advantages of Marriage Contract

The great practical advantage of a Marriage Contract from a business standpoint is that the husband may make a gift, either of real estate, furniture or money, to his future wife, and it then becomes her own property and is, except in certain cases of proven insolvency, put beyond the reach of the husband's creditors.

Gifts of this nature, however, can only be made by Marriage Contract, for during marriage the consorts are prohibited by law from conferring benefits on each other, apart from ordinary presents or reasonable sums of money given by the husband to the wife in the ordinary course of affairs, and it is obvious that, if they were allowed to do otherwise, the husband's creditors could be easily defrauded.

It is provided by law that all kinds of agreements may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void; such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death, but this general rule is subject to the qualification that all covenants contrary to public order, or to good morals, or prohibited by general law, are however regarded as null and void.

The gift of money or existing property which is actually transferred is regarded as valid subject to the qualification that it may be set aside on proof of the insolvency of the donor, either existing at the time of the gift or brought about by the gift itself.

With regard to gifts of future property in a Marriage Contract a clear distinction is now established by comparatively recent bankruptcy legislation between such gifts made prior to the 30th June, 1920, and those made subsequently.

If the Marriage Contract was passed prior to June 30th, 1920, and was registered as required by law, a claim for a certain sum of money, payable in consideration of renunciation of community rights and of dower, is a debt provable in bankruptcy, and is not postponed to the claims of other creditors on the bankruptcy of the husband.

The effect of a gift of future property made by Marriage Contract after the 30th June, 1920, is, in case of bankruptcy, governed by a special section of the present Bankruptcy Act which reads as follows:

61. Any covenant or contract made after the thirtieth day of June, one thousand nine hundred and twenty, by any person (hereinafter called "the settlor") in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money

or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt or makes an authorized assignment as aforesaid, and the covenant or contract has not been executed at the date of the petition in bankruptcy or said assignment, be void against such trustee except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy or assignment proceedings under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied. 1919, c. 36, s. 29.

In considering what may be termed the business relations of husband and wife under the regime of separation, it is important to remember that a wife separate as to property cannot obligate or bind herself either with or for her husband, and this is a wise law intended to paraphrase the words of an English jurist: "to prevent a husband from either kissing or kicking his wife into risking or losing her money for his benefit". The article of the Civil Code in question reads as follows:

"A wife cannot bind herself either with or for her husband otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect, saving the rights of creditors who contract in good faith."

This exception in favour of creditors "who contract in good faith" will not avail a lender who is put on enquiry and fails to make proper enquiries. In practice parties contracting with married women should do so only after obtaining legal advice.

Wife may act as Agent for Husband

A married woman common as to property may obligate the community when she acts either with the express, or implied authority of her husband. She may buy food required for the household, and in case of necessity may call in a doctor, and debts so incurred will be regarded as debts of the community for which the husband may be sued for payment.

A wife separate as to property may in like manner act as her husband's agent with his express or implied authority and bind him but she cannot act as surety for her husband.

